IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TERR ELLIS MacMILLAN, Appellant.	)	No. 65847-6-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: February 27, 2012

Spearman, J. — Terr MacMillan was convicted of assault in the second degree with a deadly weapon enhancement. On appeal, he claims the trial court (1) gave a flawed unanimity instruction for the deadly weapon special verdict and (2) lacked authority to impose alcohol-related community custody conditions.[1] He also asserts several claims in a statement of additional grounds (SAG). We hold that the unanimity instruction was prejudicial error under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) and that the trial court lacked authority to impose two of the alcohol-related conditions. We conclude that his SAG claims lack merit. We reverse in part, affirm in part, and remand for further proceedings.

FACTS

[1] MacMillan also claims defense counsel was ineffective for failing to object to the illegal conditions, but we do not address this claim because we directly address the validity of the conditions.

Terr MacMillan and Tracie Elliott began dating in the fall of 2009. They lived together until March 2010, when Elliott was convicted of possession of stolen property and sentenced to confinement.[2] MacMillan agreed to store Elliott's property while she was incarcerated. Sometime before Elliot's release from confinement, their relationship ended. After Elliott's release in April 2010, she found out MacMillan was storing her property at the residence of Max and Marie Shelman, the elderly parents of MacMillan's friend Sherry Grard. Elliott contacted the Shelmans, who confirmed MacMillan was storing items on their property.

Elliott and Brandon Gasho, the teenage son of a friend, went to the Shelman residence on April 29. Elliott towed away a utility trailer containing her belongings, although she knew the trailer belonged to MacMillan. Elliott and Gasho returned the next day in Elliott's sport utility vehicle (SUV). They unlocked a storage container on the Shelman property, and Elliott walked back to the SUV to position it for easier loading. She saw MacMillan drive up quickly. Elliott got into her SUV and locked the doors. MacMillan parked next to the SUV and ran to the SUV's passenger door. He tried to open the door but could not, so he returned to his car and took a sword out of the back seat. He swung the sword once at the passenger-side window of the SUV, shattering it. As Elliott tried to exit through the driver's side, MacMillan dove through the shattered window, grabbed Elliott's keys, and struck her in the head with his hand. Elliott

[2] Evidence of Elliott's convictions for possession of stolen property and theft was admitted at trial.

got out of the car and began running. MacMillan ran after her and struck her on the hip with the flat side of the sword. When Elliott fell, MacMillan struck her left thigh in the same manner. He yelled that he was going to kill her and that "I should have taken care of you on Alger Mountain that day." MacMillan moved toward the storage container and Elliott moved toward Mr. Shelman, who was nearby on his tractor. MacMillan then ran after Elliott, grabbed her by the arm, and pulled her in the direction of the storage container. Elliott sought help from Mr. Shelman, who told MacMillan to let her go or he would find himself in jail. MacMillan let her go and Elliott headed toward the Shelmans' house. She testified that she looked back and saw MacMillan standing near the cars holding her purse and the sword. Gasho saw MacMillan walk past the cars and then disappear into the nearby woods on foot. By this time, Gasho had called 911. He saw that Elliott was limping and had bruises on her leg.

Shortly after these events, Ms. Shelman was inside her house when she answered a phone call from MacMillan. Ms. Shelman testified that MacMillan asked her to go out and tell Elliott that she would have to change her story. She testified that he was "very polite." Ms. Shelman told MacMillan she did not want to get involved and declined to pass along the message. Ms. Shelman also recalled tripping over a purse, which she thought was Elliott's, inside her home. She testified that Elliott was outside where the police were during this phone call. Elliott, on the other hand, testified that she was present when Ms. Shelman was talking on the phone with MacMillan and that she recognized MacMillan's

voice because he was yelling.

The police arrived and searched the Shelman property and the adjoining woods. They did not find Elliott's purse or keys, or a sword. They found a sword sheath inside the car that MacMillan had driven. Police spoke with Elliott and observed that she was crying, breathing heavily, appeared to be in pain, and was favoring one leg. They also took photographs of bruising on Elliott's left thigh.

By amended information, the State charged MacMillan with robbery in the first degree, assault in the second degree, felony harassment, and tampering with a witness. All of the charges were designated domestic violence. Additionally, the State alleged MacMillan committed the robbery and assault while armed with a deadly weapon.

At trial, MacMillan testified that he was acting to defend his property from Elliott. He gave Elliott the keys to the storage container to get her property but wanted to be there when she did, so she would take only what was hers. He was called by Ms. Shelman after Elliott's visit on April 29 and was informed that Elliott had taken his trailer. The trailer was full of his tools but contained nothing belonging to Elliott. All of her belongings were in the storage container. He testified that Ms. Shelman called him again on April 30 and said Elliott was back. He hurried to the Shelmans' to prevent Elliott from taking the remainder of his belongings and to find out where she had taken the trailer. He also wanted his keys back. The car he was driving belonged to Grard. He denied knowing that a

sword sheath was in the car but noted that Grard "has lots of oriental stuff."

MacMillan testified that when he arrived, he walked up to Elliott and asked what she was doing and where his stuff was, but she tried to start up her car and "was going to leave, run me over." He saw that the storage container was open and his belongings were on the ground. He then grabbed a stick and broke Elliott's window. He swatted Elliott with the stick and she told him she had sold his trailer and his property was gone. He heard someone say the sheriff was coming and he fled because he had a misdemeanor warrant. MacMillan denied striking Elliott with a pipe or sword, hitting her in the face, taking her purse or keys, or threatening to kill her. He testified that when he spoke with Ms. Shelman on the phone, he wanted to tell Elliott to tell the truth. MacMillan acknowledged past convictions for theft and possession of stolen property.

The court gave the following special verdict instruction asking the jury to determine whether MacMillan was armed with a deadly weapon during the alleged robbery and assault:

> You will also be given special verdict forms. If you find the defendant not guilty of these crimes do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

For the general verdict, the jury was instructed on assault in the second degree

by use of a deadly weapon. The jury was given separate instructions defining "deadly weapon" differently for purposes of the general verdict and the special verdict.

The jury found MacMillan guilty of assault in the second degree and tampering with a witness, acquitted him of robbery, and could not reach agreement on the harassment charge.[3] The jury answered "yes" to the special verdict form asking if MacMillan was armed with a deadly weapon while committing the assault and found that Elliott and MacMillan were "members of the same family or household" for the domestic violence designation.

At sentencing, the trial court opined that the jury appeared to have given "short shrift" to MacMillan's defense of property claim. It imposed a low-end standard range sentence of 75 months of confinement, which included a 12-month deadly-weapon enhancement on the assault count. The court also noted that MacMillan's criminal history included a prior conviction for possession of a controlled substance and was consistent with that of a person with a substance-abuse problem. MacMillan did not object when the court stated that he would be required to undergo a substance-abuse evaluation and follow-up treatment. Additionally, one of the conditions of community custody stated, "Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale."

DISCUSSION

[3] The court ultimately dismissed the harassment charge with prejudice.

MacMillan claims on appeal that the trial court (1) gave a flawed unanimity instruction for the deadly weapon special verdict and (2) lacked authority to impose alcohol-related community custody conditions. He also makes several claims in a SAG. We address his claims in turn.

Special Verdict Instruction

MacMillan contends the special verdict instruction was error under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). We review de novo whether a jury instruction correctly states the relevant law. State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002).

Citing conflicting opinions from this court, the parties disagree as to whether MacMillan may raise this issue for the first time on appeal as one involving an error of constitutional magnitude. The State relies on State v. Nunez, 160 Wn. App. 150, 248 P.3d 103, rev. granted, 172 Wn.2d 1004, 258 P.3d 676 (2011) in which Division III held that a jury instruction requiring unanimity on a school zone enhancement was not manifest constitutional error that could be raised for the first time on appeal. MacMillan relies on State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004, 258 P.3d 676 (2011), in which this Division disagreed with Nunez based on our understanding of Bashaw.[4] We find the reasoning of Ryan persuasive and will review MacMillan's claim for the first time on appeal.

[4] The Washington Supreme Court has accepted review in Nunez and Ryan on the issue of whether a criminal defendant may first challenge on appeal a unanimity instruction that is erroneous under Bashaw.

The next issue is whether the jury instruction was erroneous. There is no dispute that it was. The State concedes the instruction was substantively identical to the erroneous Bashaw instruction, which told jurors they must agree on an answer to the special verdict.[5] Bashaw, 169 Wn.2d at 146.

Finally we must determine whether the instructional error was prejudicial. To find the error harmless, we must conclude beyond a reasonable doubt that the verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). The State contends any error was harmless beyond a reasonable doubt because the jury returned a general verdict finding that the assault was committed by means of a deadly weapon. We disagree. The Bashaw court, in response to the State's argument that any error was harmless because the trial court polled the jury and the jurors affirmed that their decision was unanimous, stated, "This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. The court explained:

> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. Goldberg is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." Id. at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions

[5] The Bashaw court explained, "Though unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the absence of such a special finding." Bradshaw, 169 Wn.2d at 147 (citing State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003)).Therefore an instruction stating that unanimity was required for either determination was error. Id.

> or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. This observation about the flawed deliberative process applies here. In addition, even if we were to consider the State's point that the jury found MacMillan guilty of assault with a deadly weapon, the definitions of "deadly weapon" for the general verdict and the special verdict are not interchangeable. It is easier for an item to qualify as a deadly weapon under the general verdict definition, which stated:

> Deadly weapon also [sic] means any weapon, device, instrument, substance or article including a vehicle, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

The definition of deadly weapon for the special verdict stated:

> A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

The general verdict definition encompasses not only a defendant's actual use of an instrument but also attempted or threatened use. It encompasses instruments that can produce substantial bodily harm. But the special verdict definition

requires a showing that an instrument has the capacity to inflict death, and encompasses only actual use. Moreover, as MacMillan notes, there was conflicting evidence about the implement he used to strike Elliott.[6] We conclude the instructional error was not harmless beyond a reasonable doubt and, accordingly, reverse the sentencing enhancement.[7]

Community Custody Condition

MacMillan contends there was no evidence that alcohol was involved in the offense, therefore the sentencing court erroneously imposed the alcohol-related community custody conditions. A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

MacMillan's claim involves the condition, "Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale." The State argues that the sentencing court properly imposed a substance-abuse evaluation and treatment where MacMillan did not dispute that he had a history of substance abuse. But MacMillan does not contest the

[6] Elliott testified that the instrument was a sword about three to four feet in length and about two to three inches wide. Mr. Shelman testified that he saw MacMillan break Elliott's window with what he thought was a stick. Gasho testified that the object was long, skinny, and looked like a pipe. MacMillan himself testified that he used a stick.

[7] This remedy is consistent with Bashaw and Ryan, in which the courts, after concluding that the instructional errors were not harmless beyond a reasonable doubt, vacated the sentencing enhancements and exceptional sentences respectively. Bashaw, 169 Wn.2d at 148; Ryan, 160 Wn. App. at 950.

imposition of a substance-abuse evaluation, only the alcohol-related conditions.

Under RCW 9.94A.703, some community custody conditions are mandatory, while others are subject to the court's discretion. Relevant to this case, the court may, in its discretion, order an offender to "[r]efrain from consuming alcohol" under subsection 3(e) or to "[c]omply with any crime-related prohibitions" under subsection 3(f).

We conclude that, because there was no evidence alcohol played a role in MacMillan's offenses, the sentencing court lacked authority to impose the conditions prohibiting him from possessing alcohol and from frequenting establishments where alcohol is the chief commodity for sale. The court did, however, have the authority to order the prohibition on alcohol consumption, which is specifically permitted by RCW 9.94A.703(3)(e) regardless of whether alcohol was involved in the offense. State v. Jones, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003).

SAG Issues

MacMillan's first SAG claim is that insufficient evidence supports his conviction for tampering with a witness. On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct

or circumstantial evidence, one being no more or less valuable than the other. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To convict MacMillan of tampering with a witness, the State had to prove the following elements beyond a reasonable doubt:

> (1) That on or about April 30, 2010, the defendant attempted to induce a person to testify falsely or without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and
> (2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and
> (3) That any of these acts occurred in the State of Washington.

MacMillan challenges the sufficiency of the evidence based on: (1) inconsistencies within Ms. Shelman's testimony and inconsistencies between her testimony and Elliott's; (2) Ms. Shelman's testimony that she told MacMillan she would not deliver his message to Elliott; (3) the lack of evidence that he made further attempts to persuade Shelman to deliver his message to Elliott; (4) the lack of evidence about the effect that MacMillan's words had on Elliott; and (5) the fact that Elliott was cooperative with police and appeared as a witness against MacMillan at trial.

These arguments lack merit. The crime of tampering with a witness does not require an actual contact with the witness. State v. Williamson, 131 Wn. App. 1, 6, 86 P.3d 1221 (2004). Furthermore, this claim is based mostly on the lack of consistency in and credibility of the witnesses' testimony. But "[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335 (1987)). We defer to the trier of fact on issues of conflicting testimony and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (citing State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990)).

MacMillan's next SAG claim involves the following jury question, regarding the to-convict instruction for tampering with a witness, submitted to the trial court during deliberations:

Instruction 20 Item 1[8]

> Does the delivery of a message by a second party constitute an attempt?

The trial court answered, "You are to be guided by the instructions of law previously provided." Id. MacMillan claims that the trial court did not have a well-founded reason for not answering the jury's question. But he fails to explain why the trial court's response was erroneous or prejudicial to him.

[8] Instruction No. 20, Item 1 referred to the first element in the to-convict instruction for tampering with a witness: "(1) That on or about April 30, 2010, the defendant attempted to induce a person to testify falsely or without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation . . . ."

MacMillan's last SAG claim is that he received ineffective assistance of counsel for several reasons. To prevail on a claim of ineffective assistance, a defendant must satisfy the two-prong test under Strickland v. Washington, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a defendant fails to establish either prong, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). First, he must show that counsel's representation fell below an objective standard of reasonableness. Id. Only legitimate trial strategy constitutes reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Second, he must show that the deficient performance was prejudicial. Hendrickson, 129 Wn.2d at 78. Prejudice occurs when it is reasonably probable that but for counsel's errors, "'the result of the proceeding would have been different.'" State v. Lord, 117 Wn.2d 829, 883–84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694). There is a strong presumption of effective representation of counsel, and the defendant must show that there was no legitimate strategic or tactical reason for the challenged conduct. State v McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

MacMillan contends that counsel's failure to seek a lesser included offense instruction on attempted witness tampering amounted to ineffective assistance. Assuming that a person can be charged with attempted tampering with a witness, MacMillan fails to explain why a lesser included instruction was appropriate here given the evidence. He also claims ineffective assistance based on counsel's failure to object to photographs of and testimony about

Elliott's injuries, and counsel's failure to retain a medical expert. But he does not explain why any of the photographs were inadmissible or why expert testimony was admissible, nor does he show prejudice. Finally, MacMillan claims counsel's failure to bring a Batson[9] challenge during jury selection amounted to ineffective assistance. He asserts that the prosecution struck as many men as possible to obtain a predominantly female jury, prejudicing his ability to receive a fair trial.[10] SAG 14-15. However, absent a showing of prejudice, Batson errors cannot be raised for the first time on appeal. State v. Wise, 148 Wn. App. 425, 440, 200 P.3d 266 (2009). MacMillan asserts, "It could be concluded that given the [female jurors'] responses and the fact that they as females are more vulnerable to violence and therefore more sensitive to it, that the defendant was sure to get convicted of a violent crime against a woman regardless how weak or circumstantial the evidence." This explanation is inadequate to show prejudice. Furthermore, it fails to account for the jury's acquittal on the robbery count and failure to agree on the felony harassment count.

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[9] A Batson challenge is based on the principle that the Fourteenth Amendment's equal protection clause requires defendants to be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (citing Martin v. Texas, 200 U.S. 316, 321, 26 S.Ct. 338, 50 L.Ed. 497 (1906)). Batson articulated a three-part analysis to determine whether discriminatory criteria were used to peremptorily challenge a venire member: (1) the defendant must establish a prima facie case of purposeful discrimination, by providing evidence that raises an inference that a peremptory challenge was used to exclude a venire member from the jury on account of the member's race; (2) if a prima facie case is established, the burden shifts to the prosecutor to come forward with a race-neutral explanation for challenging the venire member; and (3) the trial court must determine whether the defendant has established purposeful discrimination. Batson, 163 U.S. at 96-98. A Batson challenge can also be raised against peremptory challenges based on gender. State v. Burch, 65 Wn. App. 828, 833-36, 830 P.2d 357 (1992).

[10] The prosecution used peremptory challenges to strike six men and one woman from the venire. The defense struck five women and two men, and the jury was ultimately composed of three men (one being an alternate juror) and ten women.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Spearman, J.

WE CONCUR:

Appelwick, J.

Becker, J.